IN THE SUPREME COURT OF THE UNITED STATES

October Term 1938

No. 554

H. C. RORICK, JOSEPH R. GRUNDY and J. R. EASTON,

Appellants,

vs.

BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT, etc., et al.,

Appellees.

BRIEF FOR APPELLEE, BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT.

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BRIEF FOR APPELLEE, BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT.

This suit is brought against the Board of Commissioners of Everglades Drainage District, the Trustees of the Internal Improvement Fund of the State of Florida, the Treasurer of the State of Florida, and the taxing officials (Clerks, Tax Assessors and Tax Collectors) of each of the several counties of the State of Florida in which the lands comprising the Everglades Drainage District are located (R. 1-2). The matters alleged in the original Bill of Com-

plaint, the Supplemental Bill of Complaint, and the Second Supplemental Bill of Complaint, affecting each of the foregoing defendants or groups of defendants are diverse and separate in many particulars. This separate brief is therefore filed on behalf of the defendant, Board of Commissioners of Everglades Drainage District. Certain contentions insisted upon by Appellants, which primarily involve the Trustees of the Internal Improvement Fund, will not be argued at length here for the reason that they probably will be fully answered in a separate brief of said Trustees. Certain contentions herein considered may not be argued in the separate brief of the Trustees. Failure to argue any such contentions herein results from an effort to avoid duplications in the separate briefs as far as possible, and should not be construed as an admission of any sort.

OPINIONS BELOW

The official report of the opinion delivered in the Court below from which this appeal is taken is set forth in 24 F. Supp. 458. An earlier opinion—delivered prior to the filing of the Second Supplemental Bill of Complaint herein—is reported in 57 F. (2d.) 1048.

JURISDICTION

The grounds upon which jurisdiction herein, and the exercise of such jurisdiction, are opposed are set forth hereinafter in the Argument at length. Concisely stated, the bar of the Eleventh Amendment to the Constitution of the United States is asserted and relied upon, it is further insisted that the Appellants have an adequate remedy at law, and that the matters and things set out in the various Bills of Complaint herein are not such as to move the Court

to exercise its equity jurisdiction even if it had such jurisdiction.

STATEMENT

To clarify the issues here involved and the positions of the parties, some further analysis of the pleadings should be added to the Statement of the Case made by the Appellants.

The original Bill of Complaint (R. 1-54), filed May 19, 1931, set up the Acts of the Florida legislature (enacted during the period beginning in 1913 and ending in 1925) under which the bonds of the Everglades Drainage District were authorized to be issued and were issued (R. 1-31). That bill then attacks Chapter 13633, Acts of 1929 (which revised the acreage tax rates in the District) as a reduction of the acreage tax alleged to have been pledged to the payment of the bonds (R. 31-33), and Chapter 13,711, Acts of 1929, (which set up Okeechobee Flood Control District) as a diversion of acreage tax (R. 33-35). It is alleged that the Trustees of the Internal Improvement Fund are required to bid in the lands sold at the annual tax sales, if there are no other bidders, and to pay taxes on such lands, but that no taxes are collected on said lands which the Trustees of the Internal Improvement Fund have so bought in, and that, omitting taxes on said lands, taxes are about to be assessed on the other lands in the District on the basis of the said 1929 Acts. (R. 39-40). The prayers of the bill seek an adjudication that the acreage taxes fixed by the Acts under which the bonds were authorized and issued are the taxes properly assessible and collectible, and enjoining the assessment and collection of acreage taxes at any lesser rate (R. 40-43). It is unnecessary to consider this Bill of Com-

plaint further since Chapter 13633, Acts of 1929, was revised by the subsequent Acts of 1931 and 1937 hereinafter mentioned, and Chapter 13,711, Acts of 1929, was thereafter expressly repealed by Chapter 16090, Acts of 1933.

The Supplemental Bill of Complaint (R. 55-68), filed July 4, 1931, attacked Chapter 14717, Acts of 1931, (enacted May 20, 1931) by which the acreage taxes were revised, and prayed (in addition to the prayers contained in the original bill) that it be adjudged that certain portions of that Act impaired the obligation of the bonds. It further prayed for an adjudication: that the Trustees of the Internal Improvement Fund were required to buy all property in the District which was sold for unpaid taxes, where there were no other bidders who bid the amount of the delinquent taxes; that said Trustees were required to pay cash for such property so bid off; and that the Trustees were required thereafter to pay annually the acreage taxes on such property so purchased by them (R. 64-72). The features of the 1931 Act which were complained of, other than those which involved the Trustees of the Internal Improvement Fund, were revised by the Act of 1937. We can therefore consider such allegations in connection with the Second Supplemental Bill of Complaint which deals with the 1937 Act.

It should here be pointed out that the only complaint here asserted which involves the Trustees of the Internal Improvement Fund is that set forth under Point Numbered 4, beginning on page 58, of Appellants' Brief in which they insist that the Trustees are obligated to purchase the lands in the District sold for defaulted taxes and to pay annually the acreage taxes assessed against such lands thereafter. All other grievances here asserted by Appellants arise under

the Act of 1937 and are set out in the Second Supplemental Bill of Complaint.

The Second Supplemental Bill of Complaint (R. 208-229), filed July 19, 1937, after the case had remained entirely dormant for more than four years, in paragraph numbered 1 repeated the allegations with respect to the duties and liabilities of the Trustees of the Internal Improvement Fund, and alleged that after the filing of the First Supplemental Bill a proceeding was had in the Supreme Court of the State of Florida as a result of which the acreage taxes thereafter assessed and collected were the correct and proper acreage taxes, namely those which were levied at the time when the bonds were authorized and issued, and it was further alleged that the tax assessors and collectors were performing their duties in respect of the assessment and collection of said acreage taxes (R. 209-211).

By paragraph numbered 2 of the Second Supplemental Bill, certain changes in parties, by reason of the death of certain parties and the election of new officials, were suggested (R. 211-212).

By paragraph numbered 3 of said Second Supplemental Bill, it was alleged that the Legislature of the State of Florida, in the year 1937, had passed an Act amending the Act of 1931, (said Act of 1937 being Chapter 17902) (R. 212-213). In paragraph numbered 4 of the Second Supplemental Bill, the Appellants set forth the particulars in which the Act of 1937 was alleged to violate the obligations of their bonds (R. 213-223).

Without any further allegations of fact, the Second Supplemental Bill proceeds with its prayers for relief (R. 223-229).

The first prayer is for the relief prayed in the Original and the First Supplemental Bill of complaint (R. 223). We have heretofore observed that the only relief prayed in those earlier bills which is still involved in the case is the relief sought against the Trustees of the Internal Improvement Fund with respect to the lands sold for defaulted taxes.

The prayers numbered 2, 14 and 15 are not material. Prayers numbered 3, 4 and 5 request an order enjoining the Board of Commissioners of Everglades Drainage District from transmitting tax lists to the tax assessors, and the tax assessors from entering upon their tax rolls, and the tax collectors from collecting, the acreage taxes upon the lands in the District, unless such taxes are at the rate and in the amounts levied and imposed upon said lands by the statutes under which the bonds of the District were authorized to be issued (viz., the rates fixed in the Act of 1925) (R. 224-225). Conversely prayer numbered 13 prays a mandatory injunction requiring the transmittal of the tax lists at the rate fixed in the Act of 1925 (R. 227-228).

It is then prayed that the Board of Commissioners be enjoined from compromising or adjusting or cancelling any acreage tax liens for prior years or extending the time for the redemption of any such taxes, which powers the Act of 1937 had purported to vest in said Board. (Prayers 6, 7, 8 and 9, (R. 225-226).

By prayer number 12, Appellants request an injunction against the acceptance of bonds or coupons in the redemption of lands sold for taxes (R. 227).

By prayers numbered 10 and 11 (R. 226-227) the Appellants request a declaratory adjudication that the Act of 1937 is void as against the bondholders and that the earlier acts under which the bonds were authorized to be

issued constitute a part of the obligation of the contract of the holders of said bonds.

Certain of these objectives are abandoned in the Appellants' Brief and more general language is there used. But briefly stated the contentions of the Appellants are that the subsequently enacted statutes impair the obligation of their contract in that:

(a) They reduce the acreage taxes levied for payment of the bonds from the rates fixed in the Act of 1925 to the rates fixed in the Act of 1937. (Appellants' Brief, 21-33);

(b) The Act of 1937 levies acreage taxes for the purpose of administration and maintenance which are asserted to be diversions of acreage taxes alleged to have been pledged by the earlier Acts to the payment of the bonds (Appellants' Brief, 33-55);

(c) They enable bonds and coupons to be used in the payment of acreage taxes in lieu of money (Appellants' Brief, 55-58); and

(d) They relieve the Trustees of the Internal Improvement Fund of the necessity of paying subsequent acreage taxes on the lands sold for non-payment of taxes and not purchased by other bidders (Appellants' Brief, 58-88).

For those reasons Appellants assert that a cause of action in equity is stated, and that the lower Court should not have dismissed the suit. An analysis of the reasons upon which that Court acted discloses the correctness of its conclusions.

ARGUMENT

I. The Unconstitutionality of a State Statute Is Not of Itself Ground For Equitable Relief.

Even if the statutes here assailed impaired the obligation of the contract evidenced by the bonds here involved in all of the particulars above mentioned, it does not necessarily follow that a cause of action in equity has been stated.

We have pointed out that the Second Supplemental Bill alleges the passage of the 1937 Act and the particulars in which it is alleged to violate the obligation of the bondholders' contract, and is thus alleged to be unconstitutional. But there is no allegation that any action whatsoever is threatened or imminent in pursuance of that Act.

Thus the Second Supplemental Bill prays that the Board of Commissioners of Everglades Drainage District be enjoined from adjusting taxes for 1936 and prior years as authorized in the Act. But there is no allegation that any such compromise is pending, threatened, or even remotely contemplated by said Board of Commissioners. It is prayed that the Board of Commissioners and the Trustees of the Internal Improvement Fund be enjoined from making any settlements between themselves in the consummation of any debt refunding or adjustment plans negotiated by the Board of Commissioners, without any intimation that there are any debt refunding or adjustment plans negotiated or under consideration. The same bill prays that the Board of Commissioners be enjoined from cancelling acreage tax liens upon property in the Drainage District which belongs

to the United States Government without any allegation that any one is considering the cancellation of any such taxes or even that the United States Government owns any such land. Similarly as to the authorization contained in the 1937 Act by which bonds or coupons may be accepted instead of money in the redemption of lands sold for the non-payment of taxes, there is no allegation that such bonds or coupons are being accepted in redemption of such taxes or will be so accepted.

In all of these particulars there is no allegation other than that the Act authorizes these things to be done, and that the Act is therein unconstitutional, and that the Appellants pray an injunction against the doing of these particular things.

As is pointed out in *14 R.C.L. 321*, injunctions are not issued for the prevention of wrong in the abstract or to prevent an injury which is not imminent and irreparable. The mere fact that the Act of 1937 may be unconstitutional is not of itself ground for equitable relief in the Courts of the United States.

Terrace vs. Thompson, 263 U. S. 197;

New Jersey vs. Sargent, 269 U. S. 328.

With respect to all of these matters where no action is required by the Act of the Board, including the acceptance of bonds in redemption of taxes, some allegation of threatened action or injury is essential in order that the bill should contain equity. This is true regardless of the merits as to the constitutionality of the legislative act.

2. The Right To The Relief Sought Against The Trustees of The Internal Improvement Fund Has Been Denied By The Supreme Court of Florida.

Dismissing the matter of the use of bonds to pay taxes, it is obvious that the gist of the relief here sought is: (a) to enjoin the Board of Commissioners of Everglades Drainage District and the taxing officials in that District from assessing and collecting the acreage taxes fixed by the Act of 1937 and at the same time requiring said Board to transmit to the taxing officials tax lists for 1937 and subsequent years at the rates and amounts fixed by the Act of 1925; and (b) requiring the Trustees of the Internal Improvement Fund to pay taxes on lands sold for non-payment of taxes and not purchased at such sale by other bidders.

The latter problem, i.e., the liability of the Trustees of the Internal Improvement Fund for taxes on lands sold for non-payment of taxes, was directly passed upon and determined contrary to the contention of the Appellants in the case of *State ex rel. Board of Commissioners v. Sholtz, 112 Fla. 756, 150 So. 878.* We insist that it was rightly so decided and that such decision is binding upon the Federal courts, but we shall not here argue the point at length, since it will be fully covered in the separate brief of said Trustees.

3. The Lower Court In Dismissing This Suit Pointed Out That The Appellants Had An Adequate Remedy at Law.

With respect to the remaining relief sought, i.e., the right of the Appellants to an injunction against the Board

of Commissioners of Everglades Drainage District and the various taxing officials in that District requiring acreage taxes at the rates fixed in the Act of 1925 and not at the rates fixed in the Act of 1937, we call attention to the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Everglades Drainage District vs. Florida Ranch and Dairy Corporation*, 74 F. (2d) 914. That case was cited by the lower Court in its opinion and judgment denying the injunction here sought, and dismissing this suit (R.248).

In that case a suit in equity was brought by the Florida Ranch and Dairy Corporation against the same Board of Commissioners of Everglades Drainage District here involved in the United States District Court for the Southern District of Florida for the purpose of enjoining that Board from transmitting to the Tax Assessors of the various Counties within the District the tax lists at the rates prescribed by the Act of 1925 and for the purpose of enjoining them from transmitting any such lists except at the rates prescribed by the Act of 1923, the bill of complaint alleging that the Act of 1923 provided a higher rate of taxation and that the reduction of rate of taxation by the 1925 Act, in producing less revenue for the payment of bonds, impaired the obligation of the contract of the plaintiff as a holder of bonds of the District.

In reversing the decree of the District Court, which had entered a decree for the Plaintiff, the Circuit Court of Appeals for the Fifth Circuit said (p. 917-918):

> "Plaintiff alleges that because of the changes made in 1925 less revenue will be realized. Whether that prophecy be true or not necessarily rests on opinion evidence, which in the nature of things

would be so insubstantial as to be of no probative value. But in our opinion plaintiff has the right to show if it can that the reduction of taxes in the largest zone containing 2,000,000 acres, upon which the taxes have been decreased some $85,000 per annum by the act of 1925, impairs the obligation of its contract as a bondholder. Mandatory injunction is not directly prayed for by the bill but if it is inferentially, or if the bill could be cured in that respect by amendment, yet, as it appears to us, mandatory injunction to restore the higher taxes levied by the 1923 act should not, in the exercise of a sound discretion, be issued. Plaintiff has an adequate remedy at law by first reducing the amount due on its bonds to judgment, and then, if necessary in aid of such judgment, by proceeding by mandamus to seek the restoration of the levy authorized by the 1923 Act on the lands in the largest zone containing 2,000,000 acres of border lands. This being so, plaintiff is not entitled to proceed in equity for relief by injunction. 14 R.C.L. 317, 341.

"The decree is reversed, with directions to dismiss the bill of complaint without prejudice to the right of the plaintiff to proceed in an action at law and seek therein to compel the restoration of taxes as levied by Chapter 9119, Acts of 1923, wherever such taxes have been reduced under the provisions of Chapter 10026, Acts of 1925."

That case is decisive of the rights of the Appellants here asserted. Where in that case it was alleged that the taxes fixed by the Act of 1923 had been reduced by the

Act of 1925, it is here alleged that the taxes fixed by the Act of 1925 have been reduced by the Act of 1937. In each instance it is asserted that the later Act impaired the obligation of the contract under which the bonds were issued. In each instance an adequate remedy at law is available. We agree with the lower Court in its view as to the conclusiveness of that decision (R. 248), but we shall now discuss other citations demonstrating the soundness of that decision.

4. Having An Adequate Remedy At Law The Appellants Are Not Entitled To Proceed In Equity.

Title 28, U.S.C.A., Section 384 provides: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."

It affirmatively appears from the Appellants' contract with the District that they have an adequate remedy by mandamus to enforce a full compliance with all the provisions thereof. Section 23 of the Act under which these bonds were issued (Section 23 of Chapter 6456, Acts of 1913, appearing as Section 1557, Compiled General Laws of 1927) provides in part as follows:

> "Any holder of any of said bonds or coupons may either at law or in equity by suit, action or mandamus enforce and compel the performance of the duties required by this Article of any of the officers or persons mentioned in this Article in relation to the said bonds, or to the collection, enforcement and application of the taxes for the payment thereof; Provided, however, that no obliga-

tion authorized by this Article shall be construed as an obligation of this State, but only as the obligation of the drainage district herein created."

In the case of *Walkley v. City of Muscatine, 6 Wall. 481, 18 L. Ed. 930*, the court said:

"We are of opinion the complainant has mistaken the appropriate remedy in the case, which was by writ of mandamus from the Circuit Court in which the judgment was rendered against the defendants. The writ affords a full and adequate remedy at law. There are numerous recent cases in this Court on the subject.

"We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus. An injunction is generally a preventive, not an affirmative remedy. It is sometimes used in the latter character, but this is in cases where it is used by the court to carry into effect its own decrees—as in putting the purchaser under a decree of foreclosure of a mortgage into the possession of the premises."

In the case of *Coquard v. Indian Grave Drainage Dist. (C.C.A. 7), 69 F. 867*, suit was brought to enjoin the commissioners of the named drainage district from receiving bond coupons in payment of assessments. The Court there said:

"Was the appellant entitled to the injunction which he asked against the further acceptance of coupons in discharge of taxes levied for the pay-

ment of interest on the second assessment? On behalf of the appellees it is contended that the proper remedy, if the appellant is entitled to relief, is by mandamus to compel the collection under the law, and payment of the amount due him, as if the compromise agreement had not been made. We concur in that view. *** In so far as it interferes with the appellant's right to have levies made and enforced in the manner provided by law, it is, as we assume, illegal. But it does not follow that an injunction is necessary. Mandamus, it is conceded, is the proper remedy to enforce the collection of taxes; and, if proper levies of taxes are not made, mandamus, it is well settled, is the means of relief. Walkley v. Muscatine, 6 Wall. 481; Heine v. Board, 19 Wall. 655; Barkley v. Commissioners, 93 U.S. 258; Chicago, D. & V. R. Co. v. Town of St. Anne, 101 Ill. 151; East St. Louis v. Underwood, 105 Ill. 308; 2 Dill. Mun. Corp. Sec. 855."

An extensive note upon this subject is to be found in *93 A.L.R., at pages 1495-1505*, where it is laid down as a well settled general principle that a suit for injunction may not be maintained where there is a remedy by mandamus, and where numerous cases are cited.

It is true that by Rule 81(b) of the Federal Rules of Civil Procedure mandamus has been abolished, but it is there provided that "Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

In *Pape v. St. Lucie Inlet Dist. and Port Authority*, (C.C.A. 5) 75 F. (2d) 865, where an attempt was made to

obtain a decree adjudging that certain bonds first issued had priority of payment out of taxes of the named district over bonds subsequently issued, and where a mandatory injunction enforcing such adjudication was sought, the Court said:

"It is perfectly plain, however, that plaintiff's bill does not state a case for the exercise of the equity jurisdiction, because plaintiff has an adequate remedy at law by mandamus, Walkley v. City of Muscatine, 6 Wall. 481, 18 L.Ed. 930; Fineran v. Bailey (C.C.A.) 2 F.(2) 363; Everglades Drainage District v. Florida Ranch & Dairy Corp., 74 F.(2d) 914; Safe Deposit & Trust Co. v. City of Anniston (C.C.) 96 F. 661; Coquard v. Indian Grave Drainage District (C.C.A.) 69 F. 867; Virginia v. West Virginia, 246 U.S. 565, 38 S.Ct. 400, 62 L.Ed. 883; State of Oregon v. Slusher, 114 Or. 498, 244 P. 540, 58 A.L.R. 114, and Note p. 117; State ex rel. Havana State Bank v. Rodes (Fla.) 157 So. 33; Humphreys v. State, 108 Fla. 92, 145 So. 858, and because, considered on its merits, the bill is without equity."

Continuing the Court said:

"Federal equity jurisdiction will not be exerted to interfere in matters involving the fiscal or public affairs of a state or its subdivisions, without a substantial showing of the existence of a right, and a really threatened and irreparable injury to it demanding the protection of a federal equity court. Commonwealth of Pa. v. Williams, Feb. 4, 1935 (U.S.) 55 S.Ct. 380, 79 L.Ed. ___; Harrisonville

v. W. S. Dickey Clay Mfg. Co., 289 U. S. 334, 53 S.Ct. 602, 77 L.Ed. 1208; Fenner vs. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927; Central Ky. Natural Gas Co. v. R.R. Comm., 290 U.S. 264, 54 S.Ct. 154, 78 L.Ed. 307; Matthews v. Rodgers, 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447; Stratton v. St. L. S. W. R. Co., 284 U.S. 530, 531, 52 S.Ct. 222, 76 L.Ed. 465; Yarnell v. Hillsborough Pkg. Co. (C.C. A.) 70 F. (2d) 435; Boise Artesian Hot & Cold Water Co., v Boise City, 213 U.S. 276, 29 S.Ct. 426, 53 L.Ed. 796; Northport Co. v. Hartley, 283 U.S. 568, 51 S.Ct. 581, 75 L.Ed. 1275; c/f Amazon Petroleum Corp. v. R.R. Comm. (D.C.) 5 F. Supp. 639."

5. Under The Eleventh Amendment To The Constitution of the United States the Court Had No Jurisdiction To Entertain This Suit.

In the original Bill of Complaint the jurisdiction of the Court was invoked by reason of diversity of citizenship (R. 2-3). So far as the Trustees of the Internal Improvement Fund are concerned there is no other ground of jurisdiction. As we have above pointed out the relief sought and insisted upon here against the Trustees of the Internal Improvement Fund is a mandatory injunction requiring them to pay to the Board of Commissioners of Everglades Drainage District the subsequent drainage taxes due upon all lands bid off to said Trustees. In the event of the failure of said Trustees to pay the amounts so due, the Appellants pray that said Trustees be required to give a true accounting of all property owned or controlled by them, and all sums of money due or that may become due to them. (R. 66-67).

The right to require the Trustees to pay these subsequent acreage taxes on the lands sold for defaulted taxes is asserted under the Acts in pursuance of which the bonds were issued, viz., the Acts as they existed in the year 1925, and not under the subsequent Acts of 1929, 1931 and 1937 here assailed as unconstitutional.

In other words, the relief sought against the Trustees is affirmative relief which the Appellants assert they are entitled to under an Act upon which they rely and which they do not allege to be unconstitutional.

In their brief (p. 86-87) they assert that this suit can be maintained against the Trustees because "public officials cannot claim exemption from suit while acting under an unconstitutional statute". We have no quarrel with the law there asserted or the cases there cited. That law has no application to the situation here involved. We quote from *Hopkins v. Clemson Agricultural College, 221 U.S. 636*, the first case so cited by them, the following:

> "No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights. Cunningham v. Macon & Brunswick R.R., 109 U. S. 446; North Carolina v. Temple, 134 U.S. 22; Louisiana v. Steele, 134 U.S. 230; Louisiana v. Jumel, 107 U.S. 711; Pennoyer v. McConnaughy, 140 U.S. 1; In re Ayers, 123 U.S. 443; Hans v. Louisiana, 134 U.S. 1; Harkrader v. Wadley, 172 U.S. 148; Hagood v. Southern, 117 U.S. 52, 70."

The suit here is for affirmative relief under a statute the constitutionality of which is unquestioned. It seeks to compel the Trustees to do affirmative acts which affect the State's property rights.

Again, the Appellants insist that there is express consent that the Trustees may be sued (Appellants' Brief 87). But where the right to maintain the suit is based upon diversity of citizenship, no consent by the State to submit itself to suit can supply the necessary diversity of citizenship, for the State is not a citizen.

State Highway Commission of Wyoming vs. Utah Construction Company, 278 U.S. 194, 199;

Postal Telegraph Cable Company vs. Alabama, 155 U.S. 482, 487;

Minnesota vs. Northern Securities Company, 194 U.S. 48, 63.

This Court has recognized that the Trustees of the Internal Improvement Fund of the State of Florida are merely agents for the State vested with the legal title to lands owned by the State for the purpose of more convenient handling of said lands, and that the State of Florida remains the beneficial owner of the lands.

State of Florida v. Anderson, 91 U. S. 667, 670, 676.

The functions and attributes of the Trustees of the Internal Improvement Fund are discussed in greater detail in their separate brief. Those Trustees are "the arm or alter ego" of the State. The relief sought is not to enjoin the Trustees under an unconstitutional act, but to require

them affirmatively to pay money and to account for their property, all of which they hold in trust for the State of Florida, under a constitutional act. This is undoubtedly a suit against the State of Florida.

Whether it is possible to maintain this suit against the Board of Commissioners of the Everglades Drainage District, as being also a State agency, it is unnecessary to consider. In a suit to enjoin that Board from issuing additional bonds under an Act of 1927 (subsequently repealed), the District Court For the Northern District of Florida in the case of *Rorick vs. Board of Commissioners of Everglades Drainage District, 27 F. (2nd) 377*, declared that a suit against that Board was not a suit against the State, and that they could be enjoined as State officers from acting, in issuing the additional bonds, under the unconstitutional Act of 1927. At the same time it was pointed out that the Supreme Court of Florida in the case of *Martin vs. Dade Muck Land Company, 95 Fla. 530, 116 So. 449*, had declared that the Everglades Drainage District was a State agency and a statutory subdivision of the State for special governmental purposes. It should also be borne in mind here that part of the relief asked against the Board of Commissioners of the Drainage District is a mandatory injunction commanding them to transmit tax lists at the rates specified by the Acts in effect in 1925, which Acts the Appellants rely upon and do not assert to be unconstitutional.

We submit that the Eleventh Amendment to the Constitution of the United States, reading as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

> United States by citizens of another State, or by citizens or subjects of any foreign State."

is a bar to the prosecution of this suit.

6. Chapter 6456, Laws of Florida, 1913, is a Constituent Part of Appellants' Bond Contract.

We come now to the consideration of the merits of the Appellants' case.

Everglades Drainage District was created by Chapter 6456, Acts of 1913. Mr. Justice Strum, in delivering the opinion of the three-judge court, rendered on April 13, 1932, and reported in 57 Fed. (2d) 1048, stated that:

> "Legislation by authority of which bonds are issued, and their payment provided for becomes a constituent part of the contract with the bondholders. *** "

The Federal Supreme Court, in considering a contract arising from a state law, will treat it as if there was embodied in its text the settled rule of law which existed in the state at the time the state action relied upon as a contract was taken.

Ennis Water Works v. Ennis, 233 U. S. 652,

Inasmuch, therefore, as Chapter 6456, supra, constitutes the initial legislation, by authority of which the bonds owned by appellants were issued, that Chapter must of necessity be a constituent part of the contract with the bondholders.

7. The Statute in Question Must be Construed so as to Give Effect to the Legislative Intent.

The argument of appellants, that the proceeds of the statutory tax is exclusively pledged to the bondholders, is based upon the technical rules of statutory construction that where different parts of a statute are conflicting, the last in order of arrangement and the most specific and particular parts of the statute prevail.

But in construing a statute in Florida, the primary object is to discover, disclose and fix the true legislative intent. See

State v. DeWitt C. Jones Co., 108 Fla. 613, 147 So. 230; 59 C. J. 943.

In the case of *State of Florida v. Sullivan, 95 Fla. 191, 207; 116 So. 255*, the Court said:

> "In statutory construction legislative intent is the pole star by which we must be guided, and this intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled canons of construction. The primary purpose designated should determine the force and effect of the words used in the Act, and no literal interpretation should be given that lends to an unreasonable or ridiculous conclusion or a purpose not designated by the lawmakers."

In the case of *Realty Bond & Share Co. v. Englar, 104 Fla. 329, 336, 337; 143 So. 152*, the Court said:

" 'the intent of a statute is the vital part, and the primary rule of construction is to ascertain and give effect to that intent, and the entire statute should be construed and effect given to every part thereof, if it is reasonably possible to do so.' "

Construing the statutes according to the primary and governing rules above stated, it must be concluded that proceeds of the acreage tax may be used to pay reasonable expenses of the Board of Commissioners necessarily incurred as we shall now demonstrate.

8. The Proceeds of the Acreage Taxes are Statutory Funds which, Among Other Purposes, are Expressly Appropriated to the Payment of Expenses Incurred by the District.

The purpose of the creation of the District is stated in Section 1 of Chapter 6456, Laws of 1913, as follows:

> "That for the purpose of draining and reclaiming the lands hereinafter described and protecting the same from the effects of water, for agricultural and sanitary purposes, and for the public convenience and welfare, and for the public utility and benefit, a drainage district is hereby established to be known and designated as the Everglades Drainage District, * * *"

Sections 2, 3 and 4 of said Chapter provide for the creation of a Board of Commissioners of said District and prescribe the general powers and rights of the Board.

The only tax levied or imposed by this Act is an acreage tax, which, by Section 5 thereof, is declared to be:

> "For the purpose of constructing, completing and maintaining the works of drainage and reclamation hereby authorized for the benefit and protection of the lands in said district, * * *".

It should be noted that no reference is made to the fact that the annual assessment of taxes levied and imposed thereby are for the purpose, exclusive or otherwise, of paying bondholders.

The disposition of the proceeds arising from said acreage tax is provided for by Section 6 of said Chapter 6456, which Section, in its entirety, is as follows:

> "The proceeds arising from the acreage tax levied by this Act shall be used by the said Board in the construction and maintenance of such canals, drains, levees, dikes, dams, reservoirs, sluices, revetments and other works and improvements as the said Board may deem necessary or advisable to drain and reclaim the lands in said district, and to the continuation of the construction of such canals, dams, locks, levees, and reservoirs as are now in process of construction within said drainage district, and to the purchase of lands or personal property as the Board may deem necessary to carry out the purposes of this Act, and to the expenses of the Board in the conduct of said work and its business generally, and to repay any loans and the interest thereon, and to the creation of a sinking fund for the retirement of the principal of the

bonds that the Board may issue under the provisions of this Act, and to the payment of the interest thereon."

This Section 6 has been in force and effect ever since the District was created. From the time of the organization of the District, until 1921, when a one mill ad valorem tax was imposed by Chapter 8412, Laws of Florida, 1921, the acreage tax provided for by Chapter 6456, supra, was *the only tax imposed* upon lands of the District, and the proceeds of that acreage tax were the only source available for the purpose of paying the expenses of the Board in the conduct of the work provided for by Section 6 and its business generally.

Sections 7 to 18, inclusive, of Chapter 6456, supra, set forth the provisions for the levying and collection of acreage taxes within the District.

Sections 19 to 23, inclusive, authorize and empower the Board of Commissioners of Everglades Drainage District to borrow money on permanent loans and incur obligations from time to time in the manner specifically thereby provided for.

Section 24 of said Chapter provides as follows:

"It shall be the duty of the State Treasurer or his successor in office, as custodian of the funds belonging to the said Board of Commissioners and to the said Drainage District, out of the proceeds of the taxes levied and imposed by this Act and out of any other moneys in his possession belonging to the said Board or to the said Drainage District, which moneys so far as necessary are hereby set apart and appropriated for the purpose,

to apply said moneys and to pay the interest upon the said bonds as the same shall fall due and at the maturity of the said bonds out of the said moneys to pay the principal thereof, and there shall be and there is hereby created a sinking fund for the payment of the principal of the said bonds, and the said Board shall set apart and pay into such sinking fund annually out of the taxes levied and imposed by this Act, and the other revenue and funds of the said District, at least two per cent. of the amount of bonds outstanding. The said sinking fund for the payment of the principal of said bonds shall not be appropriated to any other purpose than that herein specified."

Section 25 of said Chapter provides for the investment of the sinking fund provided for by Section 24. The remaining Sections of said Chapter are, we believe, immaterial to this cause.

The inference which must be drawn from the provisions of Section 5 and 6 of Chapter 6456, supra, is that the proceeds arising from the acreage tax levied by said Chapter shall be used:

(a) As provided in Section 5: "For the purpose of constructing, completing and maintaining the works of drainage and reclamation hereby authorized";

(b) As provided in Section 6: "In the construction and maintenance of such canals, drains, levees, dikes, dams, reservoirs, sluices, revetments and other works and improvements as the Board may deem necessary or advisable";

(c) As provided in Section 6: "To the continuation of the construction of such canals," etc.; and

(d) As provided in Section 6: "To the expenses of the Board in the conduct of said work and its business generally,".

as well as to the repayment of loans and interest thereon and the creation of a sinking fund.

Appellants argue on authority of *Rorick vs. Board of Commissioners, 57 Fed. (2d) 1048* (Brief of Appellants 39), that the provisions of Chapter 6456, supra, authorizing use of proceeds of Drainage District taxes to pay general expenses did not authorize such use to the prejudice of the rights of the bondholders to have such proceeds applied exclusively to the payment of bonds and the interest thereon. That case was decided on April 13, 1932.

Thereafter, on November 17, 1933, the Supreme Court of the State of Florida, in the case of *State ex rel. Sherrill vs. Milam, 113 Fla. 491, 153 So. 125,* in considering the ability of the Board of Commissioners of Everglades Drainage District to obtain funds for the purpose of paying the expenses involved in levying taxes within that District, held that originally the Board of Commissioners had had authority to borrow money temporarily, for emergencies, and that provisions for the payment of those temporary loans, *and for the payment of the general expenses of the Board* of Commissioners *from acreage taxes,* were in force and in effect at the time that the Everglades Drainage District was created *and were then still in effect.*

The following is the language of the Court appearing in that opinion (153 So., Text 131):

"It appears to have been the intention of the lawmakers that, if funds were necessary to take care of any of these preliminary steps for getting the acreage taxes properly on the tax rolls, they could be raised through temporary loans. Section 18 of Chapter 6456, supra, provided as follows:

'The said Board is hereby authorized and empowered *in order to provide for the work described in this Act to be performed, to borrow money temporarily* from time to time *for a period not exceeding one year at any one time and to issue its promissory notes therefor,'* etc. (Italics supplied).

The same provision is brought forward as section 1177, Revised General Statutes of Florida (now Comp. Gen. Laws 1927, Sec. 1552).

Section 6, of chapter 6456 (Comp. Gen. Laws, 1927, Sec. 1535), the Everglades Drainage District Act, provides that among other uses to be made of the acreage tax levied by the act, the board might use it to purchase 'lands or personal property as the Board may deem necessary to carry out the purposes of this Act, *and to the expenses of the Board in the conduct of said work and its business generally, and to repay any loans and the interest thereon,'* etc.

In other words, while there were no funds on hand, for the starting of the machinery of the Everglades Drainage District, the board of commissioners of Everglades drainage district were given a credit, by being empowered to borrow money temporarily, for emergencies, so to speak, and these loans were backed by, and to be paid from, the proceeds of acreage taxes collected after the prep-

aration of tax lists, the entry thereof on the tax roll of the several counties and the taxes collected.

These provisions for 'temporary loans,' *for the payment thereof, and for the payment of the general expense of the board of commissioners, from the taxes, are still in effect.* See Sections 1165 and 1177, Revised General Statutes of Florida, sections 1535 and 1552, Compiled General Laws of Florida. * * * "

(Emphasis in the foregoing quotation is supplied by the Court, except in the last paragraph thereof, where emphasis was supplied by briefer).

This decision by the Supreme Court of Florida, the Court of last resort in that State, clearly is contrary in effect to the decision rendered by the three-judge court in the case at bar as reported in 57 Fed. (2d), supra.

The three-judge court, which later considered the instant case, and whose opinion is set forth in 24 Fed. Supp., at Page 458, must have considered that the Supreme Court of Florida had passed upon this point and decided it adverse to appellants herein, for in that case, the Court said:

"From an examination of the cases of Martin v. Dade Muck Land Company, 95 Fla. 530, 116 So. 449; State ex rel. *Sherrill v. Milam, et al.*, 113 Fla. 491, 153 So. 100, *125*, 136; State ex rel. Board of Commissioners of Everglades Drainage District v. Sholtz, 112 Fla. 756, 150 So. 878; Everglades Drainage District, et al. v. Florida Ranch & Dairy Corporation, 5 Cir., 74 F. 2d 914, it appears that the Supreme Court of Florida has passed upon the

questions presented to this court adverse to plaintiff, and notwithstanding the decision in the Rorick case, Rorick v. Board of Com'rs., 57 F. 2d 1048, this court is bound by the construction placed upon these statutes by the highest court of the state. Erie Railroad Company v. Harry J. Tompkins, 58 S. Ct. 817, 82 L. Ed. 1188." (Emphasis supplied)

That reference to the case of *State ex rel. Sherrill v. Milam, 153 So. 125*, supra, shows that the lower Court, in the case at bar, was of the opinion that the Supreme Court of Florida had, in that case, passed upon the question here under discussion adverse to plaintiff, and notwithstanding the earlier opinion herein. The reason for that conclusion is that in the case of *Sherrill, et al. vs. Milam*, supra, the Court dealt primarily with the question of the right of the Board of Commissioners to use the proceeds of acreage taxes for expenses of operation in connection with making up tax lists in accordance with statutory requirements, and, so far as we can see, with no other point relevant to the instant case. At that time they were in default as to principal and interest in a sum far in excess of the annual acreage tax. The ability of the Board of Commissioners to comply with the mandate of the writ requiring it to make up the tax lists was shown to depend upon its ability to raise funds to comply therewith. The Supreme Court of Florida held as above shown that the Act creating the District gave the Board of Commissioners ample power to raise such funds, and that they still had these powers.

The Supreme Court of Florida, in a case decided as late as the 31st day of October, 1938, re-affirmed its position that the proceeds of tax collections under the original Everglades Drainage Act are statutory funds which are

expressly appropriated "to the payment of bonds issued *and other authorized expenses incurred* by the District". (Emphasis supplied).

In that case, State ex rel. Yonge vs. Franklin et al, ——Fla.——, 184 So. 237, in ruling on the sufficiency of petitions for alternative writs of mandamus filed in that Court by certain persons seeking to have the Court issue writs directing the Board of Commissioners of Everglades Drainage District to pay certain sums to relators therein for legal services rendered, the Court declared:

> "* * * the proceeds of tax collections from which the payments are commanded to be made, are statutory funds which are expressly appropriated to the payment of bonds issued *and other authorized expenses incurred by the District;* and while the statute contemplates the payment of all proper expenses in executing the purposes of trust, yet there is no express appropriation to pay any class of such expenses; and being trust funds, payments therefrom not covered by commands of the statute are to be enforced by courts of equity ***". (Emphasis supplied).

In support of their contention that Section 6456, supra, and particularly Section 24 thereof, makes an exclusive appropriation of the acreage taxes for the payment of bonds, which is a part of an irrepealable contract with the bondholders, Appellants cited, in addition to the Rorick case above referred to, the case of *Lainhart v. Catts, 73 Fla. 735, 75 So. 47;* and *Bannerman v. Catts, 80 Fla. 170, 85 So. 336.*

However, in those cited cases *it was not held* by the Supreme Court of Florida *that the appropriation made* by

Chapter 6456 *was for the purpose of creating the sinking fund only;* the holding was *that the appropriation was for the purposes specified in Sections 6, 24 and 25.* The language of the opinion in the Lainhart case upon this point is as follows:

> "The money raised by the special assessment is not paid into the general treasury of the state, but is a special fund, placed in the custody of the state treasurer to be expended for certain specified purposes designated by the act, as in sections 6, 24 and 25.
>
> The revenue raised by virtue of the act, is to be used for the purpose of draining and reclaiming the land in the drainage district in order to render the same more susceptible to cultivation, more habitable and more sanitary, in the interest of the public health, benefit and welfare, as plainly stated in the act. * * *
>
> It seems clear from the acts under consideration that the Legislature intended to, and did appropriate the revenues derived from the special assessment to carry out the very purpose of the acts. * * * "

The holding in the Lainhart case upon this point was followed in the later case of *Bannerman v. Catts,* above cited.

9. Judicial Constructions That Payment of the Expenses of the Board May be Made From the Acreage Taxes Collected do not Impair Appellants' Contract.

The provision in the Act for the payment of the expenses of the Board in its business generally was not an "impairment" in the constitutional connotation. In the case of *Long Sault Development Company vs. Call*, 242 U. S. 272; it was said by the Court, speaking through Mr. Justice Clarke:

> "****the provisions of the Constitution of the United States for the protection of contract rights are directed only against the impairment of them by constitutions or laws adopted or passed subsequent to the date of the contract *** *and do not reach decisions of courts construing constitutions or laws* which were in effect when the contract was entered into, as has been held by a long line of decisions, extending from *Knox v. Exchange Bank, 12 Wall. 379, to Cross Lake Shooting and Fishing Club v. State of Louisiana, 224 U. S. 632.*" (Emphasis supplied).

In the case of *Cross Lake Shooting and Fishing Club v. Louisiana*, 224 U. S. 632, last mentioned, Mr. Justice Van Devanter, speaking for the Court, unequivocally declared:

> "****the Constitution *** declares, 'No state shall *** pass any *** law impairing the obligation of contracts.' This clause, as its terms disclose, is not directed against *all* impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. *It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made.*" (Emphasis supplied).

Thus the decisions of the Florida Supreme Court in the cases of State ex rel. Sherrill v. Milam, supra, and State ex rel. Yonge v. Franklin, supra, construing the Act under which the Appellants' bonds were issued to authorize the use of acreage taxes assessed by the Act for the purpose of paying expenses of the operation of the District do not constitute an impairment of the obligation of Appellants' contract.

10. The Provisions of Subsequent Acts Levying Additional Taxes for the Payment of the Expenses of the Board Are Not Invalid.

Even if the acreage taxes assessed by the Act of 1913 were appropriated exclusively to the payment of the bonds that would not prevent the levying of additional taxes for the purpose of paying operating expenses by subsequent Acts of the Legislature.

That fact was recognized in the opinion of the lower Court in the first opinion in this case (*Rorick vs. Board of Commissioners of Everglades Drainage District*, 57 Fed. (2d) 1048). Mr. Justice Strum, delivering the opinion of the Court, after declaring that the acreage taxes were pledged exclusively to the payment of bonds and interest, if necessary, said (Text 1056) (R. 94, 96):

> "If, as urged by the board, it (the Board) would by this holding be left without adequate operating or maintenance revenue, the situation may be met by further exertion of the taxing power to provide the same."

To the same effect was the decision in the case of *Knott vs. United States ex rel. Rorick*, 69 Fed. (2d) 708. In that case, Mr. Justice Walker, in delivering the opinion of the Court, said:

> "To another provision of that act (section 24) in reference to the application by the state treasurer, as the Custodian of the funds belonging to said board of commissioners, of proceeds of the above-mentioned taxes to the payment of matured principal and interest of such bonds, counsel for the appellees attribute the effect of requiring such application for the purpose of paying matured principal and interest of bonds as to which such application is sought, though a result of such application is to exhaust the funds mentioned, leaving no part thereof to be applied to the payment of necessary expenses of maintaining the drainage works constructed or of the matured principal or interest of the bonds equally entitled to payment. Rorick v. Board of Commissioners of Everglades Drainage District (D. C.) 57 F. (2d) 1048, 1056. *No such contention was made, or reasonably could be made, with reference to the proceeds of an annual ad valorem tax which, by an act passed in the year 1921 (Laws of Florida, 1921, c. 8412), was levied and assessed on all real, personal, and mixed property in said Everglades Drainage District, to be 'known as a maintenance tax and shall be used for maintenance, repairs, upkeep, and any other general or necessary purpose of the District.'* Section 1. A result of that act was that appellant became the custodian of funds of the Everglades Drainage

District which the appellees had no right to have applied to the payment of bonds and coupons issued by that district which were held by them." (Emphasis supplied).

Appellants recognize that such authority is vested in the Legislature and so admit on Page 41 of their brief, where the following language is used:

> "The Legislature has ample power to levy, when necessary, additional taxes for payment of operating expenses."

Appellants cannot interfere with and control the Acts of the Legislature of the State of Florida in levying a tax for the maintenance and operation of Everglades Drainage District. Even if it be conceded that appellants are entitled to a levy of the acreage taxes in effect at the time their bonds were authorized to be issued, still they have no authority, by obtaining judicial decrees or otherwise, to exercise or usurp the taxing power of the Legislature of the State of Florida. The taxing power is a legislative power, and can only be exercised under and by virtue of that power, and by the particular officers and in the particular manner provided for by the Legislature.

This Court stated the law on that point in the early case of *Heine v. Board of Levee Comrs.*, 19 Wall. 655, 22 Law Ed. 223. There it was said:

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty. State or National. In the case before us the Na-

tional sovereignty has nothing to do with it. The power must be derived from the Legislature of the State."

In the case of *Rees vs. City of Watertown*, 19 Wallace 107, 22 Law. Ed. 72, this Court said:

> "***We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important.***

In that same case the Court made the following observation which is peculiarly applicable to the instant case:

> "***The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money for the payment of these bonds would be void. But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his

debt was contracted he has no cause of complaint.***"

The necessity of funds for additional maintenance and operating expenses in the District was recognized by the Legislature of Florida in 1921. At that time, Chapter 8412, Laws of Florida, 1921, was adopted. That Act provides:

> "Section 1. That there is hereby levied and assessed on all real, personal and mixed property in the Everglades Drainage District of Florida, including the lands held by the Trustees of the Internal Improvement Fund for the State of Florida, annually, beginning with and including the year 1921 a tax of one mill on each one dollar of valuation, and the said tax to be known as a maintenance tax and shall be used for maintenance, repairs, upkeep, and any other general or necessary purpose of the District."

Thereafter, in 1937, the Legislature of Florida, again recognizing the needs of the District, enacted into law Chapter 17902, Laws of Florida, 1937, which was an Act amending Chapter 14717, Acts of Florida, 1931. By Chapter 17902, supra, and particularly Section 4 thereof, it was provided:

> "That for the purpose of paying the cost of administering the affairs of the said District generally,"

there was levied and imposed on lands within Everglades Drainage District, a special tax or assessment in the form of an acreage tax.

The first of these taxes levied was an "ad valorem" tax, the second an "acreage" tax. However, this is of no consequence for in the case of Knott v. U. S. ex rel Rorick, 69 Fed. (2d) 708, at page 711, the Circuit Court of Appeals for the Fifth Circuit in discussing the acreage tax levied by Chapter 6456, Acts of Florida, 1913, and the ad valorem tax levied by Chapter 8412, supra, held that both might be described as "drainage taxes". In that opinion the Court said:

> "The last-mentioned circumstance is deprived of much of the significance attributed to it by the fact that in other parts (e.g., section 6) of that act the tax levied by it was called 'the acreage tax.' Manifestly the parts of that act in which the tax it levied was called the drainage tax was not intended to distinguish that tax from any other tax the proceeds of which were applicable for use for any purpose of Everglades drainage district, as no other such tax was authorized or levied prior to the enactment of the act of 1921 providing for the maintenance tax. *Both the acreage tax levied* by the act creating Everglades drainage district *and the ad valorem maintenance tax* levied by the act of 1921 well might *be referred to or described as a drainage tax*, as the proceeds of each of those taxes were applicable to the payment of expenses incident to the construction, operation, or maintenance of drainage works of that district provided for by the act which created it." (Emphasis supplied).

Thus the legislature of Florida has levied two taxes for the purpose of maintaining the District and paying the cos

of administering its affairs. Those taxes are separate from and in addition to the acreage taxes levied under the Acts by which the bonds were authorized. As appears above, the fact that those taxes are additional or that they were subsequently enacted does not affect their validity.

CONCLUSION

For the foregoing reasons and the facts appearing in the record, the decision of the lower court should be affirmed.

Respectfully submitted,

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DATED: March 18, 1939.

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